RECORD AND BRIEFS

15-1248

Supreme Court, U.S.
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In The

Supreme Court of the United States

MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's decision to quash or enforce an EEOC subpoena should be reviewed *de novo*, which only the Ninth Circuit does, or should be reviewed deferentially, which eight other circuits do, consistent with this Court's precedents concerning the choice of standards of review.

2. Whether the Ninth Circuit's decision to enforce an EEOC subpoena, depending upon a notion of relevance so broad that it effectively abrogates statutory limits on the EEOC's investigative powers, conflicts with *EEOC* v. *Shell Oil*, 466 U.S. 54 (1984) and the holdings of at least three other circuits.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption of this petition contains all parties to the proceedings.

Petitioner McLane Company, Inc. (McLane) was the Defendant and Appellee below. McLane is a non-public, wholly-owned subsidiary of Berkshire Hathaway, Inc. Berkshire Hathaway, Inc. is publicly traded on the New York Stock Exchange.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner McLane Company, Inc. respectfully submits this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The district court's order granting enforcement of the EEOC's subpoena in part, and quashing it in part, is unreported, and appears in the Appendix ("App."), at 18-34. The Ninth Circuit Court of Appeals Memorandum decision was issued on October 27, 2015 and appears at App. 1-17. The order of the court of appeals denying rehearing *en banc* is unreported. App. 34.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals' Memorandum decision was issued on October 27, 2015. On December 11, 2015, McLane timely petitioned the Ninth Circuit to rehear the appeal *en banc*. On January 22, 2016, the Ninth Circuit denied that petition. This Court has jurisdiction over this Petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the EEOC's investigative authority under 42 U.S.C. § 2000e-8(a).

> **42 U.S.C. 2000e (8)(a) Examination and copying of evidence related to unlawful employment practices**
> In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

INTRODUCTION

In granting the Equal Employment Opportunity Commission ("EEOC") subpoena authority, Congress limited that authority to inspecting and copying evidence "relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). In *EEOC* v. *Shell Oil*, 466 U.S. 54, 64 (1984), this Court explained how that limitation reflects "Congress' desire to prevent the [EEOC] from exercising unconstrained investigative authority." To ensure the EEOC exercises its subpoena power within statutory limits, this Court admonished that courts must be careful not to construe the

relevance requirement "in a fashion that renders that requirement a nullity." *Id.* at 69.

The Ninth Circuit's decision in this case irreconcilably conflicts with *Shell Oil*, and decisions of other courts of appeals faithful to it by enforcing a subpoena that amounts to an impermissible fishing expedition for irrelevant material far outside the scope of the charge under investigation. It does so by endorsing an unbounded theory of relevance that effectively erases the statutory limits on the EEOC's investigative authority. At the same time, the Ninth Circuit's decision exacerbates an acknowledged circuit split that pits that court against eight other circuits on the critical question of whether to review *de novo*, or instead with deference, district court determinations of *Shell Oil*'s touchstone limitation—relevance—in enforcing or quashing EEOC subpoenas. This Court should grant the petition to resolve both conflicts and bring the Ninth Circuit in line with this Court's precedents and the other circuits on these important questions. Uniform application of *Shell Oil*'s relevance limitation is especially necessary in an increasingly national economy where the EEOC conducts investigations that are national in scope. Additionally, uniform deference to district court determinations would empower district courts to do what they are better suited to do—hear evidence, make factual determinations, and understand a case in its totality—as well as discourage the forum shopping and protracted litigation that is fostered by the Ninth Circuit's present standard.

Given the sheer size of the Ninth Circuit—as well as the vast number of employers across the Nation with ties to that Circuit—the Ninth Circuit's departures from the precedent of this Court and the decisions of other circuits in this critically important (and rapidly growing) area of the law is serious, and warrants this Court's review. The Court should grant the petition, resolve the conflicts, and restore national uniformity on these substantial, important questions of law.

STATEMENT OF THE CASE

A. McLane, a Leading Distribution Company, Administers a Physical Capability Evaluation To Employees Returning From Absences in Excess of 30 Days, Including Damiana Ochoa.

McLane is a leading distribution company that buys, sells, and delivers more than 50,000 different consumer products to nearly 90,000 locations across the United States, including convenience stores, drug stores, and chain restaurants.

To ensure that its employees have the strength needed to safely perform the essential functions of positions identified as physically demanding, McLane requires all newly hired employees and all employees away from the physically demanding aspects of their position for more than 30 days to take a physical capability evaluation (the "Evaluation"). The Evaluation

is designed, administered, and evaluated by a third party, Industrial Physical Capability Services, Inc. ("IPCS"). ER 46; SER 44, n.1.

After taking maternity leave from August until the end of October 2007, respondent Damiana Ochoa—who worked for McLane's Arizona facility, McLane Sunwest—took the Evaluation three times: twice in November, and once again in December. *Ibid.* With each Evaluation, Ochoa failed to demonstrate the minimum physical capability for her particular position. As a result, she was released from her position. *Ibid.*

B. Ochoa Filed a Charge of Gender Discrimination, Mentioning the Americans With Disabilities Act, But Not the Age Discrimination in Employment Act.

In 2007, Ochoa filed a charge of discrimination alleging gender discrimination. The Ochoa Charge alleges:

> On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (Physical Capability Strength Test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007, and December 28, 2007, I retested and did not pass. I have worked for the above-named

> employer for over eight years as a cigarette selector.
>
> I believe I have been discriminated against because of my sex, female, (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> The physical capability strength test is given to all employees returning to work from medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended. ER 46.

As the Ochoa Charge admits, all newly hired McLane employees, as well as all employees away from the physically demanding aspects of their jobs for more than 30 days, must take the evaluation to ensure that they have the strength needed to safely perform the essential functions of any position identified as physically demanding. Neither the EEOC nor Ochoa nor any court in this matter has ever suggested that the Evaluation policy is selectively enforced based on sex or pregnancy. And as to the reference to disability in the charge, Ochoa has never alleged that she is disabled. SER 45.

C. The EEOC Investigated the Ochoa Charge, Issuing Subpoenas and Pursuing Two Separate Enforcement Actions, One Concerning the Age Discrimination in Employment Act.

In 2009, after beginning its review of the Ochoa Charge, the EEOC greatly expanded the scope of its investigation, far beyond Ochoa's localized sex discrimination charge. The EEOC sought nationwide information about all McLane facilities, business divisions, and related entities, even though Ochoa only worked for McLane Sunwest, McLane's Arizona affiliate. The EEOC also sought information about age—though the Ochoa Charge never mentions age, and though Ochoa was under the age of 40 when she filed the charge.

McLane gave the EEOC information consistent with the scope of the Ochoa Charge, and objected to the requests for matters not relevant to it. SER 45. The EEOC responded by saying it would expand the investigation of Ochoa's Title VII charge into a far broader inquiry into the "nationwide compliance" with the Age Discrimination in Employment Act ("ADEA") by McLane-related corporate entities across America. Lacking any charge of age discrimination against McLane to serve as an anchor for these expansive requests, the EEOC simply added an additional charge number—but no actual charging party—to its request for information. SER 46, 48. The EEOC did not point to any evidence that led to this expanded investigation, as no age-related information

had been provided to the EEOC. Nor did the EEOC explain why a nationwide inquiry into ADEA compliance in McLane's extended corporate family was within the scope of the Ochoa Charge. The EEOC's justification for this greatly expanded investigation was that it was "looking for victims." SER 48.

McLane sought to cooperate with the EEOC, and requested a meeting with the EEOC to work out what might be a data set manageable to produce, but which would be acceptable to the EEOC. SER 48-49. Instead of attempting to resolve the issue through discussions with McLane, the EEOC issued two almost identical subpoenas. One related to the Ochoa Charge ("the Ochoa Subpoena"). ER 46, 89. The other related to the ADEA charge number that lacked any charging party ("the ADEA Subpoena"). SER 49. McLane petitioned the EEOC to revoke the Ochoa Subpoena. ER 98; SER 49. The EEOC denied that petition. ER 124.

McLane then responded to the EEOC's Subpoenas by providing substantial information, but without waiving its objections to the production. SER 61. Though Ochoa only worked at McLane Sunwest, McLane produced information about all persons who had participated in the Evaluation nationwide. McLane produced for each such person: (1) a unique identification number; (2) the location where they worked; (3) their sex; (4) why they took the Evaluation; (5) the job they sought; (6) the physical capability achieved; and (7) whether that capability met the minimum for the job they sought.

McLane continued to seek a meeting with the EEOC to try to discuss the Ochoa Charge and assuage any concerns about the Evaluation, and also to confer about the Ochoa Charge and ADEA Subpoenas, including the relevance of their broad requests to that charge. SER 51-52. The EEOC did finally meet with McLane, but declined to confer substantively, and simply asked McLane to respond—in full—to the subpoenas. SER 52. Underscoring its cooperation, McLane then produced more information and documents, including job task analyses and related videos. SER 60, 62.

D. The EEOC Enforced the ADEA Subpoena and the Ochoa Subpoena With Considerable, But Not Total, Success.

The EEOC then sued to enforce the ADEA Subpoena. In the ADEA Lawsuit, the EEOC sought information for all current and former employees and applicants nationwide—the very information initially sought in the Ochoa Charge investigation that the EEOC described as necessary to find "victims." *EEOC* v. *McLane Co., Inc.*, No. CV-12-615-PHX-GMS, 2012 U.S. Dist. LEXIS 47443, at *2 (D. Ariz. April 4, 2012). SER 48.

The district court received briefing and held a hearing on the EEOC's requests, and McLane's objections. The district court exercised its discretion and enforced the ADEA subpoena in part, balancing the EEOC's authority to investigate against the jurisdictional limit on that authority that is the scope

of the charge. *McLane Co., Inc.*, 2012 U.S. Dist. LEXIS 47443, at **14-21. The district court concluded that the EEOC's stated scope of investigation—to determine whether the Evaluation represents a tool of age discrimination *in the aggregate*—warranted nationwide statistical data. *Id.* at *14.

The district court, however, upheld McLane's objection to the EEOC's request for personal pedigree information, including names, addresses, phone numbers, and Social Security numbers for the thousands of persons who have taken the Evaluation. *Id.* at *21. The district court determined that providing information as to why any particular employee who took the Evaluation was terminated created an undue burden, and declined to order that information produced. The district court did, however, order McLane to produce information as to whether any person who took the Evaluation suffered an adverse employment action within 90 days (whether or not the action related to the Evaluation). *Id.* at *18. McLane complied. *Ibid.*

Rejecting its substantial-but-not-total victory in enforcing its subpoena, the EEOC then sued a second time in the same district court to seek the same pedigree information, this time by enforcing the Ochoa Subpoena. ER 134. The parties made the same arguments all over again. The EEOC repeated its claims that it has the authority to request pedigree information, and that it needed to contact all Evaluation participants to see if they were disabled and if they would otherwise have been qualified to do

the job they sought. SER 19-23, 91. McLane argued that analyzing thousands of files to produce the reasons for termination of everyone who had ever taken the Evaluation was an undue burden. SER 87-88.

The district court enforced the Ochoa Subpoena to the same extent it enforced the ADEA Subpoena. ER 10-11. The district court again compelled McLane to produce nationwide statistical data concerning every single Evaluation participant. ER 10-11. But the district court again declined to order McLane to provide nationwide pedigree information. The district court reasoned that the EEOC's "primary motivation for obtaining the pedigree information related to the ADA charge" was irrelevant as Ochoa was not disabled. App. 28. The generic reference to the ADA in the charge—in the absence of any aggrieved party—was insufficient to confer authority on the EEOC to obtain the pedigree information. ER 7. Further, the EEOC had not shown that nationwide pedigree information was relevant to the charge of sex discrimination, at least at this stage of the investigation. ER 8-9. The district court again declined to order McLane to explain—for each person who ever took the Evaluation and was terminated—the reason for termination. App. 29.

E. The Ninth Circuit Reviewed the District Court's Decision *De Novo*, and Reversed the District Court's Decision To Quash the Ochoa Subpoena in Part, Relying on a Broad Notion of Relevance.

The EEOC appealed to the Ninth Circuit the District Court's denial in part of the Ochoa Subpoena. The Ninth Circuit reviewed the District Court's decision *de novo*. The Ninth Circuit candidly noted that it was unclear why it applies a *de novo* standard of review to District Court determinations concerning agency subpoenas, while other Circuits review those determinations for abuse of discretion. App. 11 (citing *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 295 (3d Cir. 2010); *EEOC* v. *United Air Lines*, 287 F.3d 643, 649, 654 n.6 (7th Cir. 2010)).

Without referring to the actual language of the charge, the Ninth Circuit nonetheless held that the pedigree information was relevant to the EEOC's investigation of the charge. The EEOC had abandoned its disability-discrimination theory in the Ninth Circuit and, instead, focused solely on the Title VII charge the district court found unpersuasive. In the Ninth Circuit's view, the information requested could assist the EEOC in investigating sex discrimination, and according to the Ninth Circuit, there was no undue burden in producing Social Security numbers. App. 10-11.

The Ninth Circuit denied McLane's petition for rehearing *en banc*. App. 35. This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

The circuits are split on two related, important questions concerning the enforcement of EEOC subpoena requests—which are on the rise across the Nation.

First, the Ninth Circuit—while conceding it is unclear why it does so—applies a *de novo* standard of review to a district court's determination of the relevance of information sought by subpoena in the course of an agency investigation. In doing so, the Ninth Circuit has departed from the other circuits that have considered the question, which have recognized that appellate courts should not substitute their own judgments for those of district courts on determinations involving mixed questions of law and fact traditionally left to the discretion of trial courts. The majority view—of affording district courts deference in these matters—is compelled by this Court's precedents on standards of review generally. Given that the standard of review not only frequently determines the outcome of an appeal, but also, in this particular context, can affect agency behavior going forward, this Court should grant the petition and bring the Ninth Circuit in line with the other circuits, and also this Court's precedents.

Second, the Ninth Circuit has departed from this Court's precedents (most notably *Shell Oil*) and the decisions of other circuits by illicitly expanding the jurisdictional limits set by Congress on the EEOC's investigative authority. In *Shell Oil*, this Court plainly admonished the lower courts that the charge document sets out the metes and bounds of the agency's investigation. 466 U.S. at 72. Regrettably, however, the Ninth Circuit has ignored that warning—and has effectively allowed the EEOC to pursue investigations untethered to the charge, and thus without any meaningful constraints. This case is paradigmatic. The Ninth Circuit allowed the EEOC to obtain information based on the possibility of violations of one statute (Title VII), after the EEOC justified its subpoena to the district court based on potential violations of another statute (ADA), which does not even apply to the worker making the charge. Thus in the Ninth Circuit, a mere generic charge of "discrimination" can now open a company's records (including sensitive, personal employee information) to any and all requests by the EEOC—even requests on grounds entirely different from those in the individual's charge. This Court's review is needed to bring the Ninth Circuit in line with other courts of appeals that respect the jurisdictional limits on the EEOC's investigative authority set out by this Court in *Shell Oil*. Given the significant recent rise in EEOC enforcement actions—which affect companies and workers in virtually every industry across the Nation—the need for this Court's guidance is especially pressing.

I. THE COURT SHOULD REVIEW THIS CASE TO RESOLVE THE CONFLICT AMONG NINE CIRCUITS ON AN ISSUE OF EXCEPTIONAL IMPORTANCE—THE STANDARD FOR REVIEWING DISTRICT COURT RELEVANCE DETERMINATIONS IN AGENCY ENFORCEMENT ACTIONS.

A. The Other Circuits Are Right: District Court Decisions Reviewing Agency Subpoenas Should Be Reviewed Deferentially, Not *De Novo*.

The Ninth Circuit itself questions why it stands alone in reviewing *de novo* the determinations of district courts regarding the enforceability of agency administrative subpoenas. App. 8 (citing *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 295 (3d Cir. 2010); *EEOC* v. *United Air Lines, Inc.*, 287 F.3d 643, 649, 654 n.6 (7th Cir. 2002)).

That court is right to question why it stands alone on that issue. Every other Circuit that has addressed this issue has held that a more deferential review of relevancy determinations—either for abuse of discretion or clear error—is appropriate. *See, e.g.*, *FTC* v. *Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 148 (D.C. Cir. 2015) (abuse of discretion); *EEOC* v. *Royal Caribbean Cruises*, 771 F.3d 757, 760 (11th Cir. 2014) (abuse of discretion); *EEOC* v. *Kronos Inc.*, 620 F.3d 287, 295 (3d Cir. 2010) (abuse of discretion); *Fresenius Med. Care* v. *United States*, 526 F.3d 372, 375 (8th Cir. 2008) (abuse of discretion); *NLRB* v. *Am. Med. Response, Inc.*, 438 F.3d 188, 193 (2d Cir. 2006)

(clear error); *EEOC* v. *United Air Lines, Inc.*, 287 F.3d 643, 649 (7th Cir. 2002) (abuse of discretion or clear error); *United States* v. *Chevron U.S.A., Inc.*, 186 F.3d 644, 647 (5th Cir. 1999) (abuse of discretion); *Reich* v. *Nat'l Eng. & Contracting Co.*, 13 F.3d 93, 98 (4th Cir. 1993) (clear error). This Court could, but need not, decide between the more deferential standards of abuse of discretion or clear error. It would create harmony among the Circuits to remand with a direction to apply either standard, or to apply one particular standard among the two.

This striking Circuit split—eight Circuits against one—results from a disconnect between this Court's precedents governing the selection of a standard of review and the chosen standard, as explained next. Following this Court's precedents on the selection of a standard of review would foster not only uniformity among the Circuits, but also a proper respect for the role of district courts in determining issues of relevance and burden, which are best commended to their expertise and frontline judgment.

B. The Ninth Circuit's *De Novo* Review Contradicts This Court's Direction as to How Courts Must Choose Standards of Review, and Reflects Insufficient Deference to the District Court's Role.

De novo review here cannot be squared with this Court's precedents on choosing the proper standard of review generally. *See Pierce* v. *Underwood*, 487 U.S. 552, 557-62, 108 S. Ct. 2541, 2546-48 (1988); *see also*

Rita v. *United States*, 551 U.S. 338, 362-63, 127 S. Ct. 2456, 2471-72 (2007) (applying *Pierce* and explaining importance of district court's direct connection to subject matter adjudicated to choice of abuse of discretion as standard). For example, in *Pierce*, the underlying issue was whether a legal position taken by the Secretary of Housing and Urban Development under the Equal Access to Justice Act was "substantially justified." In that comparable situation, this Court held that a mixed question of law and fact (like that at issue in the instant case) should be reviewed only for abuse of discretion. 487 U.S. at 560.

The touchstone of the analysis is district court competency. This Court explained that the choice of the proper standard of review "turn[s] on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Pierce*, 487 U.S. 559-60 (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985)). A deferential standard of review is appropriate where mixed questions of law and fact are concerned, this Court decided, because (among other reasons) district courts "may have insights not conveyed by the record," *ibid.*

Here, the district court likewise had a mixture of law—both Title VII and this Court's construction of relevancy in *Shell Oil*—to apply to facts including the charge at issue, the course of dealing between the EEOC and McLane, the investigation to date, and issues of burden to McLane. ER 1-11. Just as the *Pierce* Court concluded that the district court "may

have insights not conveyed by the record," *see Pierce*, 487 U.S. at 560, the district court presumably did here as well, as it saw the EEOC greatly shift its theories and explanations of its investigation over several years. The district court had to weigh the tenuous or nonexistent relationship of some of the EEOC's requests to the Ochoa Charge, on one hand, against considerations of burden and fairness to McLane, on the other. A district court's "insights not conveyed by the record" are the ones lost or ignored by subjecting its exercise of discretion to *de novo* review. The eight Circuits that review such district court decisions deferentially are right to recognize that the district court is best positioned to judge these matters, just as it was here.

That *Pierce* should compel deferential review of district court determinations about agency subpoenas is reinforced by closely related law: the standards of review of subpoenas and discovery issues generally. Reviewing courts defer to district courts as they handle those issues because—interactively and iteratively—they can better assess parties' needs, the veracity of their explanations, the resources they have (or have not) expended, and a host of prudentially significant facts that inform judgments about subpoenas and discovery issues. *See, e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 702 (1974) ("Enforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues.");

see also Gile v. *United Airlines, Inc.*, 95 F.3d 492, 495 (7th Cir. 1996) ("A district court is in the best position to decide the proper scope of discovery and to settle any discovery disputes."). So it should be here with respect to district court rulings about the validity of agency subpoenas in enforcement actions before those courts.

With respect to EEOC matters, the particularity of charges, investigations, and subpoenas—the things that make them grist for district courts—make them "multifarious and novel." *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748-49 (2014). Like discovery subpoenas in civil litigation, they are thus "not susceptible to 'useful generalization' of the sort that *de novo* review provides, and 'likely to profit from the experience that an abuse-of-discretion rule will permit to develop.'" *Ibid.*

The courts of appeals are far less well-equipped to resolve these issues, given the cold, static appellate records they receive. *See Pierce*, 487 U.S. at 560 ("Even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense."). Unlike district courts, reviewing courts cannot iterate a discussion with counsel over time, asking questions and holding additional hearings to determine what approach is best. Unlike district courts, they cannot hear live testimony where appropriate to assess the credibility of either side's explanations. And unlike district courts, they do not have a continuing relationship with the subject matter of

the litigation, which gives them not only more context in which to judge discovery and subpoena disputes, but also a chance to balance how different issues are treated in relation to each other. *Rita* v. *United States*, 551 U.S. 338, 362-63 (2007) (applying *Pierce* and explaining that a district courts' direct connection to specific facts and issues of a case counseled in favor of an abuse of discretion standard).

This Court should issue the writ here, and review the Ninth Circuit's decision, especially given that court's own observation that it is unclear why it performs *de novo* review in this area. Reversal here to confirm that abuse of discretion or clear error is the right standard would make the district courts and the courts of appeals the complementary partners they should be, with differing competencies and focuses. Each should have respect for the other's primacy in their respective roles in the federal judiciary. This Court should grant the petition to restore that balance, resolve the circuit split, and restore uniformity on an important issue of federal law and procedure.

II. THE COURT'S REVIEW IS NEEDED BECAUSE THE DECISION BELOW IGNORES STATUTORY LIMITS ON THE COMMISSION'S AUTHORITY, IN CONFLICT WITH DECISIONS OF THIS COURT AND MANY CIRCUITS.

A. The Decision Conflicts With *Shell Oil*, Which Taught That the Touchstone of Enforcing or Quashing an EEOC Subpoena Is Relevance to the Facts in the Relevant Charge.

The Court should issue the writ, because the Ninth Circuit's notion of relevance in the decision below is so broad that it cannot be squared with *Shell Oil*. This Court warned against "render[ing] nugatory the statutory limitation of the Commission's investigative authority to materials 'relevant' to a charge." 466 U.S. at 72. But the Ninth Circuit's decision in this case does just that—setting a bar for relevance so low that even the loosest and most attenuated connection to the charge will suffice, thus effectively nullifying the jurisdictional limits on the EEOC's investigative authority.

The critical part of the analysis here is the degree of connection between a charge, and a subpoena. Congress limited the Commission's jurisdiction to investigate by requiring a connection between an exercise of its investigative powers and a charge of discrimination already under investigation. *Shell Oil*, 466 U.S. at 64. "Courts," therefore, "must be careful not to construe the charge and relevance requirements so

broadly as to confer 'unconstrained investigative authority' upon the EEOC." *Kronos*, 620 F.3d at 297. Though the Commission is not required to ignore evidence of additional claims of discrimination that arise through a reasonable investigation of the charge, it must pursue its investigation with a "realistic expectation rather than an idle hope that something may be discovered." *United Air Lines, Inc.*, 287 F.3d at 653 (7th Cir. 2002) (citation omitted). The relevance requirement "cabin[s] the EEOC's authority and prevent[s] fishing expeditions." *Ibid.*

Accordingly, courts must examine the scope of the Commission's authority not by reference to the generic charge of discrimination—which every charge must contain, *see, e.g.*, ER 46—but by reference to the facts the charge alleges. The Ninth Circuit itself has acknowledged that the "crucial element of a charge of discrimination is the factual statement" that it contains. *Freeman* v. *Oakland Unified Sch. Dist.*, 291 F.3d 632, 636 (9th Cir. 2002) (quoting *B.K.B.* v. *Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002)). Hence, when Ms. Ochoa alleged that McLane discriminated on the basis of sex by requiring all employees to undertake a physical capabilities evaluation, the district court determined—consistent with *Shell Oil*—that the identifying information the Commission sought to pursue age-discrimination and disability-discrimination claims simply bore too attenuated a relationship to the charge's factual core.

The Ninth Circuit's decision, however, will virtually always permit the EEOC to gather the personal identifying information of every employee of an investigated business—so long as the potential interviewees could conceivably "cast light on the allegations against" the employer. App. 9-10.

But no reading of *Shell Oil*—which rejected a Commission proposal that the bare allegation of a charge of discrimination would suffice, 466 U.S. at 72—comports with this attenuated notion of relevance. *See* App. 9. The Ninth Circuit's decision would allow a relationship between sought-after material and an under-investigation charge so remote or speculative as to create perverse incentives for the Commission to issue or encourage generic, conclusory allegations over discrete, factual allegations in charges—thereby rendering "nugatory the statutory limitation of the Commission's investigative authority to materials 'relevant' to a charge." *Ibid.* Indeed, it is theoretically possible that virtually any confidential document in McLane's files—from its truck routes to its corporate minutes—"might" provide some information that could "shed light" on whether the Evaluation is discriminatory. That understanding of relevance extends far beyond the one this Court expressed in *Shell Oil*, and thus, far beyond the Commission's statutory authority.

B. The Ninth Circuit's Decision Conflicts With the Decisions of Other Circuits that Have Rejected the Commission's Overextensive Theories of Relevance.

Unfortunately, the Ninth Circuit's decision conflicts with not only *Shell Oil*, but also with the decisions of other courts of appeals rejecting similarly unbounded theories of relevance advanced by the Commission. For example, in *EEOC* v. *United Air Lines, Inc.*, an American employee alleged national-origin discrimination based on United Airlines's failure to contribute to the French social-security system on behalf of its American flight attendants. 287 F.3d at 646, 653. This failure resulted in the French authorities rejecting a particular American employee's temporary disability claim, and prompted a Commission investigation into "each and every benefit" provided to United's French employees. *Id.* at 654. The Seventh Circuit refused such a broad request, describing the Commission's arguments for the subpoena as "feeble" and "unconvincing." *Ibid.* To be sure, there was some relationship between the benefits that United provided to French employees and the American employee's national-discrimination claim. But the Seventh Circuit—like the district court—considered such a relationship insufficient.

The Eleventh Circuit similarly rejected another especially aggressive Commission subpoena. In *Royal Caribbean Cruises*, Royal Caribbean refused to renew an HIV-positive assistant waiter's employment contract because of his medical condition, and the

waiter alleged disability discrimination. 771 F.3d at 759. In response, the Commission sought information on all individuals either not hired or discharged for medical reasons. *Id.* The Commission defended its incredibly broad subpoena on the basis that the Commission "is entitled to expand the investigation to uncover other potential violations" of the same type. *Id.* at 761. But the relevance standard did not extend so far. "The relevance that is necessary to support a subpoena for the investigation of an individual charge is relevance to the contested issues that must be decided to resolve that charge, not relevance to * * * future charges [that may be] brought by others." *Id.* The Eleventh Circuit described this relationship as "tenuous," simultaneously concluding the subpoena sought irrelevant information and that it was unduly burdensome. *Id.* at 763.

In *Burlington N. & Santa Fe R.R.* v. *White*, 669 F.3d 1154, 1157-58 (10th Cir. 2012), the Tenth Circuit also measured the facts of the charges at issue against the broad information sought by the EEOC. In particular, the EEOC argued that "[i]f a pattern or practice of disability discrimination * * * exists, the discrimination allegedly suffered would appear to be a part of it." *Id.* at 1157. Focusing on the specific charges at issue, the Tenth Circuit explained that "[a]ny act of discrimination could be part of a pattern or practice of discrimination, but not every charge of discrimination warrants a pattern or practice investigation." *See also EEOC* v. *Packard Electric Div.*, 569 F.2d 315, 316-18 (5th Cir. 1978) (holding that the

district court did not err in limiting the EEOC's subpoenas to tailor disclosure to the character of the particular charges made rather than allowing the EEOC to obtain "broad statistical information as to the respective employers' entire work force").

Regrettably, these examples are far from exhaustive—or isolated. The Commission often presses its subpoena powers beyond their statutory scope "merely as an expedient bypass of the mechanisms required" to pursue other statutory powers. *Id.* at 762. The Commission receives between 80,000 and 90,000 charges annually, and it often responds to even questionable charges with voluminous subpoenas. "Today's EEOC * * * is pursuing many questionable cases through sometimes aggressive means," as one Staff Report puts it, and these aggressive means unnecessarily burden employers. Minority Staff Report by the United States Senate Committee on Health, Education, Labor, and Pensions.

The Ninth Circuit's decision's capacious relevance standard can only encourage the Commission to pursue enforcement actions for subpoenas of "tenuous relevance." *Royal Caribbean*, 771 F.3d at 762. And the EEOC's increasingly aggressive enforcement philosophy makes the need for judicial oversight even more acute—as the EEOC's own personnel have attested, "[a]dministrative investigations" under the Commission's most recent strategic plans "are virtually certain to involve *higher stakes, stakes of a different order of magnitude* * * * *" given the agency's focus on pursuing "systemic" discrimination. *See*

Drafting of a New Strategic Enforcement Plan by the Strategic Enforcement Plan Work Group, Public Input into the Development of EEOC's Strategic Enforcement Plan, Meeting of July 18, 2012 (written testimony of John Hendrickson, Chicago District Office, EEOC) (emphasis added).

Notably, every charge alleges some form of discrimination—it is a box on the form to be checked. *See, e.g.*, ER 46. Contrary to other Courts of Appeals that have trained their legal analysis on the nexus between the sought-after information and the charge itself, the Ninth Circuit's decision effectively vests the EEOC with virtually unfettered authority that Congress never authorized and the Supreme Court expressly disavowed. If permitted to stand, the decision would render the relevance requirement a nullity in direct contravention of this Court's decision in *Shell Oil* and the decisions of several other Circuits. This Court's review is necessary to resolve this conflict, too.

III. THE QUESTIONS PRESENTED INVOLVE ISSUES OF EXCEEDING NATIONAL IMPORTANCE.

Circuit splits involving federal administrative agencies naturally lend themselves to this Court's review, *see, e.g.*, *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645 (2015), and this case is no exception. *First*, the proper standard of review for a district court's determination that the EEOC is entitled to information

because it is relevant to the charge and not unduly burdensome is of substantial importance not only because it is often dispositive of the outcome of the appeal, and not only because it maintains the proper relationship between trial and appellate courts and their respective capabilities and expertise, but also because it can have a significant effect on agency behavior ex ante. *Second*, the proper standard for ensuring that the EEOC does not exceed its jurisdiction to investigate potential violations is also vitally important because of the potential for subjecting not only employers to great extra-statutory exposure and expense, but also employees to the release of highly personal and confidential information. These questions are of substantial importance and warrant review now.

This Court has long recognized the vital importance of the proper standard of review. The "'standard for appellate review'" is "'[a]n essential characteristic of [the federal court] system.'" *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 431 (1996) (alterations in original) (citations omitted). This Court has also recognized "that the difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.'" *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 238 (1991) (quoting *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984)).

Underscoring the issue's importance, the choice between *de novo* review and review for abuse of discretion often determines the outcome. *See Dickinson*

v. *Zurko*, 527 U.S. 150, 162 (1999) ("The upshot" is a "practical difference in outcome de-pending upon which standard is used."). And it was outcome-determinative here. Under the deferential standard applied by the eight other Circuits, the EEOC would have had to demonstrate that the district court abused its discretion (or clearly erred) in finding that the subpoena—which the EEOC based on two previous, abandoned theories—sought information too attenuated from Ochoa's sex-discrimination charge to enforce.

Further highlighting the importance of the issue is that standard of review is critical to the proper resolution of tens of thousands of charges the EEOC processes every year. Subpoena enforcement determinations, like other questions about the abuse of judicial process, are properly vested with the district courts, subject only to deferential appellate review. The Ninth Circuit's contrary approach encourages forum shopping, causes national disunity on this important question of administrative law, and, in this case, led to an incorrect resolution before the Ninth Circuit.

Further, the fact that the Ninth Circuit is the outlier makes the need for this Court's review even more pressing, given the number of cases and enforcement orders that arise from that Circuit. That improper understanding of *Shell Oil* translates into an inordinately large number of employers exposed to both the *de novo* standard of review—which favors the agency—and the broad rationale offered by the

EEOC for why it should be allowed to undertake fishing expeditions such as the one in this case. On top of that, virtually any "nationwide" company will have employees in some part of the Ninth Circuit. This means that the EEOC need only find a potential plaintiff in California, for example, to be able to sift through employer records across the country. The circuit splits raising these significant issues warrant immediate review by this Court.

IV. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED.

This case presents an ideal vehicle for resolving these entrenched splits because the questions of law decided by the Ninth Circuit lend themselves to immediate resolution by this Court. While the question of enforcement of a subpoena is a mixed question of law and fact, the operative rules by which district courts must conduct that analysis are purely legal. No further development or percolation on these questions is needed, especially given the pronounced splits that exist on these important questions—not to mention that the Ninth Circuit has recently refused to resolve the split itself, and there is no reason to think it will do so in the foreseeable future.

This case is a particularly good vehicle for resolving the standard-of-review issue, because it was outcome-determinative here and exemplifies why deferential review is appropriate. The district judge

was intimately familiar with: (i) the facts alleged in the charge; (ii) the previous subpoena enforcement action; (iii) the parties' conduct through the litigation process; and (iv) the EEOC's evolving theories of purported relevance. Of particular note here, the Commission's shifting justifications over time for its pursuit of the same information provided the district court with a strong clue that the information the Commission seeks is not relevant to the filed charge it is (purportedly) investigating. Yet the Ninth Circuit, applying *de novo* review, gave no deference to the district court's situational awareness of this litigation. This case exemplifies the error of the Ninth Circuit's ways and is thus an ideal vehicle for bringing that Court in line with the other circuits.

This case also cleanly presents the related conflict with *Shell Oil* and its mandate concerning judicial enforcement of the statutory limits on the EEOC's authority. Unable to obtain the broad information sought under a generic charge, the EEOC sought to backdoor its way to that same information by bootstrapping an ADEA subpoena onto a Title VII charge that did not even mention the ADEA. Wherever the outer limits of the EEOC's investigative authority may lie, the Ninth Circuit's decision allowing the EEOC to proceed in this fashion is far beyond them. This case therefore presents this Court with an important opportunity to rein in the Ninth Circuit, close the loophole it has created, and restore the proper bounds of the EEOC's authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff-Appellant,* v. MCLANE COMPANY, INC., *Defendant-Appellee.*	No. 13-15126 D.C. No. 2:12-cv-02469-GMS OPINION

Appeal from the United States District Court
for the District of Arizona
G. Murray Snow, District Judge, Presiding

Argued and Submitted
March 12, 2015 – San Francisco, California

Filed October 27, 2015

Before: J. Clifford Wallace, Milan D. Smith, Jr., and Paul J. Watford. Circuit Judges.

Opinion by Judge Watford;
Concurrence by Judge M. Smith

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OPINION

WATFORD, Circuit Judge:

This is a subpoena enforcement action brought by the Equal Employment Opportunity Commission (EEOC) against McLane Company. The EEOC is investigating a charge of sex discrimination filed against McLane by one of its former employees, who was fired when she failed to pass a strength test after returning from maternity leave. The subpoena seeks information about the company's use of the test and the individuals who have been required to take it. The main issue before us is whether the district court correctly held that some of the information sought by the subpoena is not relevant to the EEOC's investigation. The court refused to enforce that portion of the subpoena, and the EEOC has appealed.

I

In January 2008, Damiana Ochoa, a former employee of a McLane subsidiary in Arizona, filed a charge with the EEOC alleging sex discrimination (based on pregnancy) in violation of Title VII of the Civil Rights Act of 1964. Ochoa alleged that when she tried to return to work after taking maternity leave,

McLane informed her that she could not resume her position as a cigarette selector – a position she had held for eight years – unless she passed a physical capability strength test. Ochoa alleged that the company requires all new employees and all employees returning to work following a medical leave to take the test. Ochoa took the test three times but failed to receive a passing score on each occasion. Based on her failure to pass the test, McLane terminated her employment.

The EEOC notified McLane of Ochoa's charge and began an investigation. During the early stages of the investigation, McLane disclosed that it uses the strength test at its facilities nationwide for all positions that are classified as physically demanding. All new applicants for such positions and employees returning to such positions from a leave longer than 30 days are required to pass the test as a condition of employment.

McLane voluntarily provided general information about the test and the individuals who had been required to take it at the Arizona subsidiary where Ochoa worked. That information included each test taker's gender, job class, reason for taking the test, and score received (pass or fail). However, McLane refused to disclose what the parties have referred to as "pedigree information" for each test taker (name, social security number, last known address, and telephone number). Instead of identifying the test takers by name and social security number, McLane identified them only by an "employee ID number" created

solely for purposes of responding to the EEOC's investigation. McLane also refused to disclose, for those employees who had taken the test and were later terminated, when and why their employment was terminated.

The EEOC eventually expanded the scope of its investigation to include all McLane facilities nationwide within the grocery division (the division in which Ochoa worked), since all of those facilities used the same test for the same purposes. The EEOC sought the same information described above for each of the test takers at McLane's facilities nationwide. McLane ultimately provided most of that information, but it again refused to provide either pedigree information or, for those test takers who were ultimately terminated, the reasons for termination.

The EEOC then issued an administrative subpoena demanding production of the withheld information. McLane petitioned the EEOC to revoke or modify the subpoena, but the agency denied the petition. Upon McLane's continued refusal to provide the disputed information, the EEOC filed this subpoena enforcement action.

The district court granted in part and denied in part the EEOC's request for enforcement. The court required McLane to disclose the following information: the gender of each test taker, the date the test was given, the score the test taker received, the position for which the test was taken, the passing score for the position in question, and any adverse

employment action imposed within 90 days of an employee's taking the test. (McLane had already provided some, but not all, of that information.) The court refused to enforce the subpoena to the extent it required McLane to divulge two categories of information: (1) the pedigree information for each test taker; and (2) for those employees who were terminated after taking the test, the reasons for termination. With respect to the pedigree information, the court concluded that the EEOC did not need such information to determine whether McLane had used the test to discriminate on the basis of sex. Thus, in the court's view, the information was not relevant at this stage of the EEOC's investigation. With respect to the reasons for termination, the court did not explain why it refused to require production of that information. However, in a parallel subpoena enforcement action the EEOC brought against McLane under the Age Discrimination in Employment Act (ADEA), the court had earlier ruled that providing information about whether an adverse employment action was directly triggered by taking the test (as the EEOC had requested) would be unduly burdensome. *EEOC v. McLane Co.*, 2012 WL 1132758, at *6 (D. Ariz. Apr. 4, 2012).[1]

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[1] The EEOC has dismissed the appeal it filed in the ADEA action. And although Ochoa's charge alleged discrimination on the basis of disability under the Americans with Disabilities Act (in addition to alleging discrimination on the basis of sex), the EEOC is no longer attempting to enforce the subpoena based on

(Continued on following page)

II

Title VII grants the EEOC broad power, within specified limits, to investigate potential violations of the statute. The agency's investigative authority is triggered by the filing of a charge alleging that an employer has engaged in employment practices made unlawful by the statute. A charge may be filed either by an EEOC Commissioner or, as in this case, by "a person claiming to be aggrieved." 42 U.S.C. § 2000e-5(b). The charge is not a formal pleading governed by the legal standards applicable to the filing of a complaint. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984). Its purpose is simply to "place the EEOC on notice that someone (either a party claiming to be aggrieved or a Commissioner) believes that an employer has violated the title." *Id.* A charge is valid if it contains "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices," although even a written statement "sufficiently precise to identify the parties, and to describe generally the action or practices complained of" will do. 29 C.F.R. § 1601.12(a)(3), (b).

Once the EEOC receives a charge, the statute states that the agency "shall make an investigation thereof." 42 U.S.C. § 2000e-5(b). The EEOC's investigative authority is limited, at least initially, to the unlawful employment practices specified in the charge.

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the allegations of disability discrimination. We therefore focus our analysis on the Title VII charge alone.

Shell Oil, 466 U.S. at 64. (If new facts come to light during an investigation, the EEOC may expand its scope beyond the practices specified in the original charge. *See EEOC v. General Elec. Co.*, 532 F.2d 359, 364-66 (9th Cir. 1976).) Unlike some federal agencies, which have "plenary authority to demand to see records relevant to matters within their jurisdiction," the EEOC's authority under Title VII is more constrained. *Shell Oil*, 466 U.S. at 64. The agency has the right to obtain evidence only if it relates to employment practices made unlawful under Title VII and "is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a).[2]

When an employer refuses to comply with the EEOC's requests for information, as occurred here, the EEOC may issue an administrative subpoena and bring an enforcement action to compel compliance. 42 U.S.C. § 2000e-9 (incorporating the provisions of 29 U.S.C. § 161). The scope of judicial review in such actions is narrow. A court determines only "(1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and

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[2] Section 2000e-8(a) provides: "In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."

material to the investigation." *EEOC v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc), *overruled on other grounds as recognized in Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994). If those conditions are met, the court must enforce the subpoena unless the objecting party shows that the subpoena is overbroad or that compliance would be unduly burdensome. *Id.* We review the district court's resolution of these issues de novo. *EEOC v. Federal Express Corp.*, 558 F.3d 842, 846 (9th Cir. 2009).[3]

III

With that background in mind, we turn to the specifics of the dispute before us. McLane does not contest that the EEOC has followed the proper procedural requirements. Nor can it seriously contest that the subpoena relates to a matter within the EEOC's

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[3] Why we review questions of relevance and undue burden de novo is unclear. In a similar but related context – issuance of a protective order restricting the scope of an administrative subpoena – we have said that review is for abuse of discretion. *See McLaughlin v. Service Employees Union, AFL-CIO, Local 280*, 880 F.2d 170, 174 (9th Cir. 1989). Other circuits also appear to review issues related to enforcement of administrative subpoenas for abuse of discretion. *See, e.g.*, *EEOC v. Kronos Inc.*, 620 F.3d 287, 295 (3d Cir. 2010); *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 649, 654 n.6 (7th Cir. 2002). Nonetheless, the de novo standard of review is now firmly entrenched in our case law. *See, e.g.*, *United States v. Golden Valley Electric Ass'n*, 689 F.3d 1108, 1111 (9th Cir. 2012); *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005, 1007 (9th Cir. 1996).

investigative authority, since Ochoa's charge alleges discrimination in employment on the basis of sex. *See* 42 U.S.C. § 2000e-2(a)(1). (Title VII defines discrimination on the basis of pregnancy as a form of sex discrimination. 42 U.S.C. § 2000e(k).) With respect to the test-taker pedigree information, McLane contests whether that information is "relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). With respect to the reasons for termination, McLane contends that producing such information would be unduly burdensome.

A

We begin with the district court's refusal to compel production of the pedigree information, which the court held is not relevant at this stage of the EEOC's investigation.

The relevancy limitation imposed by § 2000e-8(a) "is not especially constraining." *Shell Oil*, 466 U.S. at 68. The question is not whether the evidence sought would tend to *prove* a charge of unlawful discrimination. At the investigative stage, the EEOC is trying to determine only whether "reasonable cause" exists "to believe that the charge is true." 42 U.S.C. § 2000e-5(b). So the relevance standard in this context sweeps more broadly than it would at trial. It encompasses "virtually any material that might cast light on the allegations against the employer." *Shell Oil*, 466 U.S. at 68-69.

Under this standard, we think the pedigree information is relevant to the EEOC's investigation. Ochoa's charge alleges that McLane's use of the strength test discriminates on the basis of sex. To decide whether there is any truth to that allegation, the EEOC can of course speak to Ochoa about her experience with taking the test. But the EEOC also wants to contact other McLane employees and applicants for employment who have taken the test to learn more about their experiences. Speaking with those individuals might cast light on the allegations against McLane – whether positively or negatively. To take but one example, the EEOC might learn through such conversations that other female employees have been subjected to adverse employment actions after failing the test when similarly situated male employees have not. Or it might learn the opposite. Either way, the EEOC will be better able to assess whether use of the test has resulted in a "pattern or practice" of disparate treatment. To pursue that path, however, the EEOC first needs to learn the test takers' identities and contact information, which is enough to render the pedigree information relevant to the EEOC's investigation. The district court erred by refusing to enforce the subpoena's request for production of that information.

McLane raises a series of arguments resisting this conclusion, but all of them lack merit. First, McLane asserts that Ochoa's charge alleges only a *disparate impact* claim, not a pattern-or-practice *disparate treatment* claim. That assertion is wrong.

Ochoa's charge does not allege discrimination based on any particular legal theory, and it did not need to do so. *See EEOC v. Kronos Inc.*, 620 F.3d 287, 300 (3d Cir. 2010). A charge is valid if it is sufficiently precise "to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b). Ochoa's charge did that by describing McLane's practice of precluding employees who have taken maternity leave from returning to work unless they pass a strength test, which she could not do despite three attempts. Ochoa's charge is framed in terms general enough to support either a disparate impact or a disparate treatment theory. *See Kronos*, 620 F.3d at 300. As the Third Circuit put it in *Kronos*, "it is up to the EEOC, not [Ochoa], to investigate whether and under what legal theories discrimination might have occurred." *Id.*

Second, McLane contends that, given all of the other information it has produced, the EEOC cannot show that production of the pedigree information is "necessary" to complete its investigation. But the governing standard is not "necessity"; it is relevance. If the EEOC establishes that the evidence it seeks is relevant to the charge under investigation, we have no warrant to decide whether the EEOC could conduct the investigation just as well without it. The EEOC does not have to show a "particularized necessity of access, beyond a showing of mere relevance," to obtain evidence. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 188 (1990). Congress has not left it to employers accused of discrimination to decide what

evidence may be necessary for the EEOC to complete its investigation. *Id.* at 193.

For similar reasons, the district court erred when it held that pedigree information is irrelevant "at this stage" of the investigation. The court reasoned that the evidence McLane has already produced "will enable the E.E.O.C. to determine whether the [strength test] systematically discriminates on the basis of gender." The court suggested that if the EEOC's analysis of that evidence reveals systemic discrimination, the pedigree information might become relevant and obtaining that information might then be "necessary." The EEOC argues that the district court improperly required it to substantiate the allegation of systemic discrimination before it could obtain access to relevant evidence. We doubt that is what the district court meant, as the Supreme Court has made plain that courts may not condition enforcement of EEOC administrative subpoenas on a threshold evidentiary showing that the allegations under investigation have merit. *Shell Oil*, 466 U.S. at 71-72 & n.26. Rather, the district court appeared to conclude that the EEOC did not really need pedigree information to make a preliminary determination as to whether use of the strength test has resulted in systemic discrimination. As we have explained, however, that line of reasoning is invalid: The EEOC's need for the evidence – or lack thereof – simply does not factor into the relevance determination. Because the pedigree information meets the broad standard for relevance, the EEOC is entitled to obtain that information now. (McLane does not

contend that production of the information poses any kind of undue burden.)

Finally, McLane contends that the pedigree information is not relevant because Ochoa's charge alleges only a "neutrally applied" strength test, which by definition cannot give rise to disparate treatment, systemic or otherwise. McLane's argument misconstrues the charge. Ochoa alleges that McLane requires all employees returning from medical leave to take the strength test before they can return to work, but she does not allege that the test is neutrally *applied.* (She alleges just the opposite – that the test was discriminatorily applied as to her.) Even though McLane requires everyone to take the test, the test could still be applied in a discriminatory manner – if, for example, the company were to routinely excuse the failure of male employees to pass the test but grant no such exemptions to similarly situated female employees. The very purpose of the EEOC's investigation is to determine *whether* the test is being neutrally applied; the EEOC does not have to take McLane's word for it on that score. *See Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 296-99 (4th Cir. 2010).

One additional note is in order regarding the EEOC's request for social security numbers. The EEOC seeks that information so that it can accurately identify individual test takers in the data sets it has received from McLane. As explained above, other employees' experiences might cast light on the allegations against McLane, whether by substantiating

them or showing them to be unfounded. Information that helps the EEOC determine whom to contact to learn more about McLane's use of the test is therefore relevant to the investigation. McLane contends that the employee ID numbers should suffice for these purposes, but that is not McLane's call to make. Furthermore, McLane does not assert any undue burden associated with producing this information, nor could it, for the original data sets contain employee social security numbers. If anything, McLane has imposed an extra burden on itself by removing that information from the data sets before producing them to the EEOC.

McLane suggests in a footnote that it is simply attempting to protect its employees' privacy interests by withholding their social security numbers, but the Supreme Court has already rejected an analogous argument. *See University of Pennsylvania*, 493 U.S. at 192-93. Congress has struck the balance between granting the EEOC access to relevant evidence and protecting confidentiality interests by imposing strict limitations on the public disclosure of information produced during the course of an EEOC investigation. *Id.*; *see* 42 U.S.C. § 2000e-8(e). McLane's dissatisfaction with that balance does not entitle it to withhold information relevant to a charge of discrimination.

B

That leaves the second category of information in dispute: the reasons for termination. The district

court provided no explanation for refusing to require production of this information. It is clearly relevant to the EEOC's investigation; McLane does not argue otherwise. McLane nonetheless attempts to defend the district court's ruling on the ground that producing this information would pose an undue burden. McLane prevailed on this argument in the parallel subpoena enforcement action in the ADEA case, but the EEOC's request there was more onerous than the one at issue here. In the ADEA action, the EEOC sought information for employees whose dismissal was triggered by failure to pass the test, but McLane represented that its human resources database did not capture such "triggering" information and that it was not otherwise readily available. *McLane Co.*, 2012 WL 1132758, at *6. Here, the EEOC is not seeking such "triggering" information; it requests instead McLane's reasons for terminating employees who had previously taken the test, regardless of any linkage between the two. Because the issue raised in this action is not the same as the issue raised in the ADEA action, the EEOC is not precluded from litigating the undue burden issue here. *See Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000).

We do not think it would be prudent for us to address the undue burden issue in the first instance. We therefore vacate the district court's order denying enforcement of the subpoena's request for the reasons for termination, and remand so that the district court can rule on whether requiring McLane to produce

that information would in fact be unduly burdensome.

REVERSED in part, VACATED in part, and REMANDED.

M. SMITH, Circuit Judge, concurring:

I concur in the majority opinion. I write separately to discuss McLane's suggestion that it was justified in withholding its employees' Social Security Numbers to protect their privacy interests. The majority opinion rejects that argument, following *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). It bears noting, however, that *University of Pennsylvania* predates the rash of "data breach" incidents that plague a world interconnected by computers.

Of particular relevance is the United States government's dismal performance in protecting even its own employees' sensitive data. *See, e.g.*, Office of Personnel Management Cybersecurity Resource Center, Cybersecurity Incidents, "What Happened," https://www.opm.gov/cybersecurity/cybersecurity-incidents/#WhatHappened (detailing the discovery in June, 2015 of the theft from the Office of Personnel Management of 21.5 million Social Security Numbers, an undisclosed number of interview records, 5.6 million fingerprints, and an undisclosed number of usernames and passwords).

Thus, it may be that the EEOC's insistence here on obtaining Social Security Numbers and other information that could be used to steal an employee's identity will endanger the very employees it seeks to protect. While we, as a court, are not in a position in this case to weigh the concerns present in any particular data gathering and storage protocol, the EEOC would be well advised to consider these issues in the collection of data in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Equal Opportunity Employment Commission, Plaintiff, v. McLane Company, Inc., Defendant.	No. CV-12-02469-PHX-GMS **ORDER**

This is an action for enforcement of an administrative subpoena issued by the Equal Employment Opportunity Commission ("E.E.O.C.") to McLane Company, Inc. The E.E.O.C. has applied for an Order to Show Cause why the Administrative Subpoena Should Not be Enforced. (Doc. 1.) The E.E.O.C. has also moved to seal certain documents that it attached to its Reply. (Doc. 12.) McLane has moved to strike the exhibits filed under seal. (Doc. 22.) A hearing was held on November 16, 2012. The motions and hearing focused on requests for the results of the Industrial Physical Capacity Services Physical Capacity Exam ("IPCS PCE"), along with pedigree information and contact information for employees and applicants who had taken this exam.

BACKGROUND

This case involves McLane's use of the IPCS PCE for its employees. On August 8, 2008, the E.E.O.C.

sent a letter to Bobby Carlson, the President of McLane Sunwest, a subsidiary of McLane, stating that it was conducting an investigation of McLane under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626 (2006) ("ADEA").

The letter stated the investigation was being conducted pursuant to two charge numbers. The first, charge number 540-2008-01093, is a charge filed by a McLane Sunwest employee on January 7, 2008, alleging that she had been discriminated against based on her gender when she had not been re-hired after taking maternity leave because she had failed the IPCS PCE. (Doc. 2-1, Ex. A-1). The second, charge number 540-2010-01761, was initiated by the E.E.O.C. itself pursuant to its authority under the ADEA. By November 2010, the E.E.O.C. determined that it would pursue the two charges separately. This Court ruled on the ADEA subpoena earlier this year. *See E.E.O.C. v. McLane Co., Inc.*, No. CV-12-615-PHX-GMS 2012 WL 1132758 (D. Ariz. Apr. 4, 2012).

McLane is now faced with a subpoena based solely on charge number 540-200801093. (Doc. 2-1, Ex. A-12.) That charge, filed by McLane Sunwest employee Damiana Ochoa, alleged discrimination on the basis of sex and disability. (*Id.*, Ex. A-1.) She alleged that she failed the IPCS PCE three times after returning to work from maternity leave, and consequently believed she has "been discriminated against because of [her] sex, female (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended." (*Id.*) She also made the following claim:

"The Physical Capability Strength Test is given to all employees returning to work from a medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended." (*Id.*) Based on this charge, the E.E.O.C. requested a variety of information from McLane in relation to the administration of the IPCS PCE, including pedigree information, such as the name, gender, date of birth, social security number and contact information for every person who took the test, along with the reason the person took the test, the person's score on the test, and any adverse action that McLane took based on the person's performance on the test. (*Id.*, Ex. A-10.) The E.E.O.C. later informed McLane that it was broadening the scope of its investigation to all McLane facilities nationwide. (*Id.*)

McLane responded on January 14, 2011, and objected to the request as overly broad, unduly burdensome, and seeking information that is not relevant to the underlying charge. (*Id.*, Ex. A-11.) The letter noted differences between its grocery division, where Ochoa worked, and the food service division. The E.E.O.C. responded on February 15 by filing a subpoena that referenced Ochoa's charge and directed McLane to turn over the information. (*Id.*, Ex. A-12.) McLane petitioned to revoke the subpoena on February 22, 2011. (*Id.*, Ex. A-13.)

It appears that some information has been exchanged between the E.E.O.C. and McLane since that time and since the Court's Order in the ADEA case.

McLane has produced a database containing all individuals who have taken the IPCS PCE in any Grocery position nationwide. (Doc. 9 at 5.) This database does not include the names or social security numbers of those individuals, but does include their location, gender, job class, test date, reason for taking the test, level achieved, whether they met the minimum requirements, and other details relating to their test scores. (*Id.* at 5-6.) In response to the Court's April Order in the ADEA case, McLane is also in the process of compiling information as to whether an adverse action occurred within 90 days of the IPCS PCE, and has stated that it will produce the information to the E.E.O.C. as soon as the dataset is complete. (*Id.* at 6.)

The parties dispute the necessity of producing the following additional information for the individuals who have taken the test: name, social security number, date of application, date of hire, last known address, phone number, reason for termination (in connection with test results or not), and their medical or disability information. In addition, McLane has only produced information relative to its grocery division, not the food services division. The E.E.O.C. continues to seek for the aforementioned information, and affirmed its position at the hearing on November 16, 2012.

DISCUSSION

I. LEGAL STANDARD

A district court's review of an administrative subpoena is "strictly limited." *E.E.O.C. v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1430 (9th Cir. 1983), *abrogated on other grounds by Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *as recognized by Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994)). Raising a defense to the merits of the charge or investigation does not defeat a subpoena. *E.E.O.C. v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001). A court reviewing the validity of an administrative subpoena instead conducts a three-part inquiry, asking: "(1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." *Children's Hosp.*, 719 F.2d at 1428. The administrative agency shoulders the burden of demonstrating that these three prongs are met. *Id.*

If the agency demonstrates that it has authority to investigate, the procedural requirements have been followed, and the evidence is relevant and material to the investigation, the burden shifts to the respondent, who must show that a subpoena is "overbroad or unduly burdensome" for a court to quash it. *E.E.O.C. v. Quad Graphics*, 63 F.3d 642, 648 (7th Cir. 1995). The question of whether an administrative subpoena is overbroad may be answered by asking whether "the

demand for information is too indefinite or has been made for an illegitimate purpose." *University of Penn. v. EEOC*, 493 U.S. 182 (1990). A subpoena may be unduly burdensome if either 1) "the cost of gathering this information is unduly burdensome in the light of the company's normal operating costs," or 2) "gathering the information would threaten [a respondent's] normal business operations." *E.E.O.C. v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986).

II. ANALYSIS

The E.E.O.C. and McLane dispute the first and third prongs of the validity inquiry. McLane asserts that the E.E.O.C. lacks authority to request information regarding disabilities based on the subpoena in question here. It also argues that the additional "pedigree" information sought for both the gender and ADA claim is not relevant at the moment. Finally, McLane complains of the breadth of the E.E.O.C.'s inquiry and asserts that production of all the requested information would create a significant burden.

A. Validity of Subpoena

The subpoena is valid if the E.E.O.C. can show that Congress has authorized it to issue such a subpoena, the subpoena was issued in a procedurally proper way, and the information requested in the subpoena is relevant to the agency's investigation. *Children's Hosp.*, 719 F.2d at 1428. The district court

plays a "strictly limited" role at this point. *Id.* at 1430.

1. Jurisdiction

Investigations conducted by the E.E.O.C. under Title VII or the ADA are "triggered by the filing of a charge of discrimination." *E.E.O.C. v. Federal Exp. Corp.*, 558 F.3d 842, 849 (9th Cir. 2009). The procedure is described in 42 U.S.C. § 2000e-5(b) (2006). The charge can be filed "by or on behalf of a person claiming to be aggrieved, or by a member of the Commission." *Id.* There are thus three categories of charges that give rise to an E.E.O.C. investigation: those brought by an aggrieved person herself, those brought by someone on behalf of an aggrieved person, and those brought by a member of the Commission on behalf of an aggrieved person. The common statutory requirement, though, is an aggrieved person. *See Federal Exp.*, 558 F.2d at 849 ("A charge may be filed by an individual who alleges that he was discriminated against or by a Commissioner of the EEOC."). It is when an aggrieved person has a charge that the E.E.O.C.'s broad investigatory powers are triggered. And the subpoena seeking information relating to potential violations of Title VII and the ADA must reference "a person claiming to be aggrieved."

The investigative powers, broad as they are, derive from the charge. "[T]he EEOC's power of investigation is anchored to the charge of discrimination, and courts must be careful not to construe the charge and

relevance requirements so broadly as to confer 'unconstrained investigative authority' upon the EEOC." *E.E.O.C. v. Kronos Inc.*, 620 F.3d 287, 297 (3d Cir. 2010). One charge appears on the subpoena in question, and the Court confines its "strictly limited" analysis to the Ochoa charge. She first alleges that she suffered gender discrimination because of the administration of the IPCS PCE. (Doc. 2-1, Ex. A-1.) There is little dispute that Ochoa is an "aggrieved party" within the meaning of the statute and that the charge gives the E.E.O.C. jurisdiction to investigate the IPCS PCE discriminates on the basis of gender.

But Ochoa's second charge – that she believes the test discriminates on the basis of disability – does not give the E.E.O.C. jurisdiction to investigate ADA violations. The statute requires that a charge be tied to a specific aggrieved party. *See* 42 U.S.C. § 2000e-5(b) (charges to be filed "by or on behalf of a person claiming to be aggrieved"). The charge does not mention any instance of discrimination on the basis of disability. Ochoa does not claim she is disabled. The parties agreed at the hearing that pregnancy is not typically a disability within the meaning of the ADA, and that Ochoa does not appear to have had the sort of atypical pregnancy that would trigger the ADA. In addition, Ochoa does not purport to bring the ADA charge for another aggrieved party. She instead makes a blanket assertion that the test violates the ADA. Such a charge does not comport with the statute. To ignore the plain language of the statute and to allow the EEOC to investigate a generalized charge of

discrimination that is untethered to any aggrieved person would invite the oft-cited "fishing expedition," *Peters v. U.S.*, 853 F.2d 692, 699700 (9th Cir. 1988), to become a full-blown harvest operation. If anyone could file a charge – devoid of a specific aggrieved party – that asserts that such-and-such policy discriminates on any number of bases, the E.E.O.C. would have close to unlimited jurisdiction, and it would make virtually limitless any investigation the EEOC wished to undertake.

The E.E.O.C. responds to the absence of an ADA-aggrieved party in the Ochoa charge by attaching three documents to its Reply. Two are charges that contain ADA grievances, and one is a declaration from a McLane employee who asserts that she was discriminated based on her diagnosis of cancer. (Docs 13-1, 13-2, 13-3.) Yet this is an Application for an Order to Show Cause Why an Administrative Subpoena Should Not be Enforced in the Ochoa investigation, not any of the three investigations that are attached to the Application. (Doc. 1.) "The EEOC is entitled only to evidence that is 'relevant to the charge[s] under investigation," and where there is only one charge listed on the subpoena, it is that charge that determines jurisdiction to enforce a subpoena. *E.E.O.C. v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1157 (10th Cir. 2012) ("The subpoena focuses on [two] charges. Nowhere in the document is there any reference to any other charge – by way of a reference to any other charging party, an additional charge number, or anything else – that might indicate

that an additional charge is at issue."). The E.E.O.C. might have withdrawn the initial subpoena and updated it to include the other charges, but it chose to rely solely on the Ochoa charge. It is true that "[o]nce the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation *of the charge*." *Kronos*, 620 F.3d at 297 (emphasis added). But the additional claims must arise in the course of a valid investigation of a valid charge. *See Gen. Tel. Co. of the N.W., Inc. v. EEOC*, 446 U.S. 318, 331 (1980) ("Any violations that the EEOC ascertains in the course *of a reasonable investigation of the charging party's complaint* are actionable.") (emphasis added). The Ochoa charge did not give the E.E.O.C. authority to investigate ADA violations. Nor has the E.E.O.C. claimed that it discovered these ADA violations while investigating Ochoa's gender discrimination claim. Consequently, the Court will not consider the additional charges attached to the E.E.O.C.'s Reply.

The subpoena the E.E.O.C. seeks to enforce is directly solely to the matter of "Ochoa v. McLane Sunwest." That matter involves two charges, only one of which involves an actual aggrieved party – a charge of gender discrimination. Therefore, the E.E.O.C. has jurisdiction to investigate the Title VII issue. The E.E.O.C.'s application to enforce the portions of the subpoena that require production of information relating to disability is denied.

2. Relevance

McLane also objects on relevance grounds to the scope of information requested in the subpoena for the gender discrimination claim. At this point, McLane has provided (or will shortly provide) data on employee test scores, location, gender, job class, test date, reason for taking the test, level achieved, whether they met the minimum requirements, and other details relating to their test scores for the grocery division. (Doc. 9 at 5-6.) The E.E.O.C. has asked for pedigree information for each individual that has taken the test: name, address, social security number, and so forth. The relevance limitation "is not especially constraining," *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 68 (1984), but it is not a rubber-stamp procedure, see *EEOC v. Harvey L. Walner & Assoc.*, 91 F.3d 963, 968 (7th Cir. 1996) (requiring that there must be "a reasonable nexus between the initial charge and the subsequent allegations in the complaint").

Again, the charge referenced in the subpoena defines the scope of the E.E.O.C.'s investigatory power. *See EEOC v. United Parcel Serv.*,94 F.3d 314, 318 (7th Cir. 1996) (recognizing that an investigation must be "reasonably related in scope to the allegations of the underlying charge"). The Ochoa charge alleges that the IPCS PCE examination systematically discriminates on the basis of gender, as evidenced by her three unsuccessful attempts to pass. Judging by the E.E.O.C.'s filings and the discussion at the hearing, the primary motivation for obtaining the pedigree information related to the ADA charge. That

information is not relevant at this stage to a determination of whether the IPCS PCE systematically discriminates on the basis of gender. The Court's statements in the earlier ADEA matter apply with equal force here:

> The E.E.O.C.'s independent investigatory power is broad, but as it has defined its investigation, the genders, names, contact information, and social security numbers of individual employees are simply not relevant – an individual's name, or even an interview he or she could provide if contacted, simply could not "shed light on" whether the ICPS [sic] PCE represents a tool of [gender] discrimination in the aggregate. The E.E.O.C. has provided nothing to the Court to allay the concerns raised by McLane that such data has been requested as a means of trolling for possible complainants. . . . 'An administrative subpoena may not be so broad so as to be in the nature of a "fishing expedition."

McLane, 2012 WL 1132758 at *5 (internal citations omitted).

McLane has provided or will soon provide the information, without individually identifying pedigree information, requested by the E.E.O.C. and ordered by this Court in the ADEA matter. The addition of the gender variable will enable the E.E.O.C. to determine whether the IPCS PCE systematically discriminates on the basis of gender. The results may

indicate that it does. At that point, pedigree information may become relevant to an investigation and the E.E.O.C. may find it necessary to seek such information. Consequently, the E.E.O.C.'s application to enforce the subpoena's directive to provide pedigree information for all those who have taken the IPCS PCE is denied.[1]

B. Breadth of Subpoena

McLane objects to the breadth of the subpoena, which it claims is addressed to the entirety of the McLane corporate family. The briefing has clarified, however, that the E.E.O.C. is only seeking the information from McLane's nationwide grocery operations, not the food service division. (Doc. 15 at 8.) McLane has stated in its Response that it has provided a nationwide database for grocery applications and employees, and it appears this database is what McLane is updating with the adverse employment decision data. (Doc. 9 at 5-6.) Given the allegation in the Ochoa charge that the IPCS PCE itself discriminates on the basis of gender and that test is administered nationwide for the grocery division, nationwide

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[1] The E.E.O.C. states in its Reply that "the statistical evidence indicates McLane's application of the PCE *violates the four-fifths rule* with respect to gender." (Doc. 15 at 7.) Given that McLane has not yet produce [sic] all of the requested information, most importantly whether an adverse employment decision occurred within 90 days of taking the test, the Court does not see how such a conclusion could be reached at this time.

data is necessary. To the extent McLane objects to providing nationwide data on overbreadth grounds, its objections are unsuccessful. McLane must produce the following information for its Grocery applicants and employees, along with a unique identification number: (1) sex; (2) test score; (3) date of the test; (4) position applied for or reason the test was taken; (5) required score for that position; and (6) whether applicant or employee suffered adverse employment action within 90 days of test result. The remaining information is not relevant to the investigation of potential gender discrimination in the IPCS PCE at this juncture.

CONCLUSION

The E.E.O.C. has received a broad grant of power from Congress to investigate allegations of Title VII and ADA violations. Yet that investigative authority derives from the filing of specific charges by specific individuals. The subpoena issued by the E.E.O.C. is governed by the charges it references. The one charge referenced here – the Ochoa charge – alleges that the IPCS PCE discriminates on the basis of gender and disability. Only the gender charge is tied to a specific grievance, however. The ADA charge fails to comply with the statute and consequently cannot trigger an E.E.O.C. investigation into whether the IPCS PCE discriminates on the basis of disability. McLane has stated its willingness to provide nationwide information on the administration of the IPCS PCE that would allow the E.E.O.C. to determine whether the

test discriminates on the basis of gender. Specific pedigree information does not, at this stage, illuminate that inquiry. Consequently, the subpoena at issue here is enforceable only to the extent it requires the information described in this order. The remaining portions fall outside the E.E.O.C.'s broad authority to investigate allegations of discrimination.

IT IS THEREFORE ORDERED:

1. The E.E.O.C.'s Motion to Seal Document (Doc. 12) is **GRANTED**. The Clerk of Court is directed to file under seal the lodged proposed exhibits (Doc. 13).

2. McLane's Motion to Strike Exhibits (Doc. 22) is **denied as moot**.

3. Regarding those people who applied to McLane and took the IPCS PCE, McLane must provide the E.E.O.C. one of the following: **either**

    a. Information on applicants who took the IPCS PCE including:

        i. The applicant's gender at the time the test was taken

        ii. The applicant's score on the test

        iii. The date the applicant took the test

        iv. The position for which the applicant applied

        v. The score required for passing the test for the position in question

vi. Whether the applicant suffered adverse employment action within 90 days of test result; **or**

b. Access to McLane's human resources records sufficient for the E.E.O.C. to obtain the data in item 3(a) above.

4. McLane must provide the E.E.O.C. information on employees who took the IPCS PCE test, including

a. The employee's gender at the time the test was taken

b. The employee's score on the test

c. The date the employee took the test

d. The reason the employee took the test

e. The score required for passing the test for the reason the employee took the test

f. Whether the employee suffered adverse employment action within 90 days of test result.

5. The Clerk of Court is directed to terminate this action.

Dated this 19th day of November, 2012.

/s/ G. Murray Snow
G. Murray Snow
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant, v. MCLANE COMPANY, INC., Defendant-Appellee.	No. 13-15126 D.C. No. 2:12-cv-02469-GMS District of Arizona, Phoenix ORDER (Filed Jan. 22, 2016)

Before: WALLACE, M. SMITH, and WATFORD, Circuit Judges.

Judge Smith and Judge Watford vote to deny the petition for rehearing en banc, and Judge Wallace so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc, filed December 11, 2015, is DENIED.